

**IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH-I, KOLKATA**

IA (IB) No.1275/KB/2020

in

CP (IB) No.1237/KB/2018

In the matter of:

Beni Gopal Singhi

...

Operational Creditor

Versus

EMC Limited

[CIN: U70100WB2010PLC151197]

...

Corporate Debtor

IA (IB) No.1275/KB/2020

An application under sections 12, 60(5) and 74 of the Insolvency and Bankruptcy Code 2016 read with rule 11 of the National Company Law Tribunal Rules, 2016 and in the alternative under sections 33 and 34 of the Insolvency and Bankruptcy Code, 2016.

In the matter of:

CA Kannan Tiruvengadam, erstwhile Resolution Professional, Chairman of the Monitoring Committee

... Applicant

Versus

Almas Global Opportunity Fund SPC
(Successful Resolution Applicant)

...

Respondent

Date of hearing: 23 February 2022¹

Date of pronouncement: 20 April 2022.

Coram:

Shri Rajasekhar V.K.

: Member (Judicial)

Shri Balraj Joshi

: Member (Technical)

Appearances (via video conferencing):

For the Applicant/Chairman of the Monitoring Committee

Mr. Joy Saha, Sr. Advocate

Mr. Pratik Mukhopadhyay, Advocate

Mr. Saptarishi Mandal, Advocate

Mr. Kannan Tiruvengadam, Chairman, Monitoring Committee (in person)

¹ Heard on 04 Jan 2021, 13 Jan 2021, 17 Feb 2021, 25 Feb 2021, 24 Mar 2021, 25 Mar 2021, 06 Apr 2021, 07 Apr 2021, 19 Apr 2021, 16 Aug 2021, 01 Sep 2021, 02 Dec 2021, 06 Jan 2022, 24 Jan 2022, 27 Jan 2022, 17 Feb 2022, and finally on 23 Feb 2022.

For the Respondent/Successful Resolution Applicant

Mr. Ratnanko Banerji, Sr. Advocate

Mr. Soorjya Ganguli, Advocate

Ms. Shreya Choudhary, Advocate

Mr. Amardeep Sharma, Authorised Representative of the SRA (in person)

ORDER

Rajasekhar V.K., Member (Judicial):

1. Prologue

- 1.1. This court convened *via* video conferencing.
- 1.2. An application under section 9 of the Insolvency and Bankruptcy Code, 2016 ('Code') was filed by Mr. Beni Gopal Singhi (***'Operational Creditor'***) against EMC Limited (***'Corporate Debtor'***), a company registered under the Companies Act, 1956, and having its registered office at No.51, Canal East Road, Kolkata 700 085, West Bengal.
- 1.3. On 12 November 2018, the said application was admitted into Corporate Insolvency Resolution Process (***'CIRP'***) by this Adjudicating Authority and Mr. Rakesh Kumar Agarwal was appointed as the Interim Resolution Professional (***'IRP'***). Further, this Adjudicating Authority *vide* its order dated 06 February 2019 appointed Mr. Kannan Tiruvengadam as the Resolution Professional (***'RP'***).
- 1.4. Subsequently, the RP received four Expressions of Interest (***'EoIs'***) from the following participants:
 - (i) Almas Global Opportunity Fund SPC;
 - (ii) Krishi International DMCC;
 - (iii) Invent Assets Securitisation and Reconstruction Private Limited; and
 - (iv) KBC Aldini Capital Limited.
- 1.5. Out of four prospective Resolution Applicants, only two submitted their plans *i.e.*, Almas Global Opportunity Fund SPC and KBC Aldini Capital Limited. However, the Committee of Creditors (***'CoC'***) in its 10th CoC Meeting on 31

August 2019 decided to drop the plan of KBC Aldini Capital Limited due to deficiencies.

- 1.6. After discussions and deliberations on the plan of Almas Global Opportunity Fund SPC (**'Successful Resolution Applicant' or 'SRA'**) by the CoC, the SRA submitted a revised Resolution Plan on 18 September 2019. The revised Resolution Plan² was approved by the CoC with 80.18% votes on 01 October 2019. The Adjudicating Authority approved the Resolution Plan *vide* order dated 21 October 2019.³
- 1.7. The SRA is a Segregated Portfolio Company (SPC) incorporated in the Cayman Islands on 11 May 2017 originally with Reg. No.AC-322800, and having its registered office at 1st Floor, The Grand Pavilion Commercial Centre, No.802, West Bay Road, P.B. No.10655, Grand Cayman KY 1-1006, Cayman Islands.⁴ However, it now has its registered office at Amicorp Cayman Fiduciary Ltd, 2nd Floor, Regatta Office Park, Leeward 2 West Bay Road, Grand Cayman, KY1-1006, KY, Cayman Islands. It is registered with Business Registry Name RA000087, **Business Registry Identifier** 1882414 and LEI Code 549300P6S7KWNOMKMU42, as per information available in the public domain.⁵
- 1.8. In terms of regulation 36B(4A) of the Insolvency & Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (**'CIRP Regulations'**) and clause 1.9 of the Request for Resolution Plans (**'RFRP'**), the SRA tendered the following Performance Bank Guarantees (**'PBGs'**):⁶

² Pages 24-89 of IA (IB) No.1275/KB/2020

³ Pages 126-139 of IA (IB) No.1275/KB/2020

⁴ Page 32 of IA (IB) No.1275/KB/2020, penultimate para defining the Resolution Applicant (internal page 9 of the Resolution Plan)

⁵ https://search.gleif.org/#!/record/549300P6S7KWNOMKMU42/record_modifications, last accessed 15 April 2022 at 3.16 PM

⁶ Pages 90-125 of IA (IB) No.1275/KB/2020

- (i) Unconditional and irrevocable performance bank guarantee being No.GROW190827001 for USD 1,440,000 (US Dollars one million four hundred and forty thousand only) equivalent to ₹10,00,00,000/- (Rupees ten crores only) dated 28 August 2019 issued by Stern International Bank LLC, San Juan, PR, United States, through Bank of Baroda, International Business Branch, Kolkata, India in favour of the Applicant along with a letter of undertaking to convert the bid bond guarantee to a performance bank guarantee. The said bank guarantee was valid till 25 November 2019.
 - (ii) Bank Guarantee No.ACB190925002KTG for USD 2,850,000 (US Dollars two million eight hundred and fifty thousand only) equivalent to ₹20,00,00,000/- (Rupees twenty crore only) dated 25 September 2019 issued by Axios Credit Bank Limited, through Bank of Baroda, International Business Branch, Kolkata, India in favour of the Applicant.
- 1.9. Post approval of the Resolution Plan by this Adjudicating Authority, the Monitoring Committee (***'Monitoring Committee or 'Committee'***) was constituted on 02 November 2019, in terms of the approved Resolution plan, with the erstwhile RP as the Chairman of the Committee. The first meeting of the Committee also took place on 02 November 2019.
2. ***The prayers in IA (IB) No.1275/KB/2020***
- 2.1. This is an interlocutory application filed on 23 November 2020 under section 60(5) of the Code, filed by the Chairman of the Monitoring Committee (***'Applicant' or 'Chairman'***), who was also the erstwhile RP, against the SRA *inter alia* praying for the following reliefs:⁷
- (i) The Resolution Plan of the SRA as approved by the Adjudicating Authority *vide* its order dated 21 October 2019 be cancelled, discharged, rescinded and abrogated;
 - (ii) The Performance Bank Guarantees issued by the SRA be invoked and the amounts thereof be forfeited;

⁷ Pages 11-12 of IA (IB) No.1275/KB/2020

- (iii) Appropriate directions on the SRA or persons in the management and control of the SRA to ensure effective invocation and forfeiture of the Performance Bank Guarantees;
- (iv) Notice of this application be served upon the officers and the persons in the management and control of the SRA;
- (v) The officers and persons in the management and control of the SRA be directed to disclose the names and particulars of the other persons and officers in the management and control of the SRA, who are responsible for the violation and contravention of the approved Resolution Plan, so that necessary notices of this application may be served;
- (vi) The officers and the persons in the management and control of the SRA be punished and fined in the manner as specified under section 74(3) of the Code;
- (vii) The entire period consumed in the CIRP commencing from the date of the admission of the Corporate Debtor, *i.e.*, 12 November 2018 till the date of passing of orders in this application be excluded;
- (viii) The CIRP in respect of the Corporate Debtor be directed to commence afresh and the Chairman be once again appointed as the Resolution Professional;
- (ix) The period to complete the CIRP be extended by 180 days from the date of passing of orders on this application;
- (x) As an alternative to prayers (vii), (viii) & (ix), order of liquidation be passed in respect of the Corporate Debtor in terms of sections 33 and 34 of the Code.

3. ***Submissions of Mr Joy Saha, Ld. Sr Counsel appearing on behalf of the Chairman of the Committee/Applicant***

- 3.1. As per the Resolution Plan, the SRA proposed to settle the outstanding dues of the Corporate Debtor by bringing in an aggregate amount of ₹568 crore.⁸ Further, as per the Resolution Plan the entire payment was to be made within a

⁸ Page 46 of IA (IB) No.1275/KB/2020 (point 8.1(a) of the Resolution Plan)

period of sixty days from the date of approval of the Resolution Plan by the Adjudicating Authority.⁹ But the only amount that has been paid by the SRA is a sum of ₹30 crore on account of Earnest Money Deposit (EMD) and PBGs.

- 3.2. During the second meeting of the Monitoring Committee on 26 November 2019, the SRA asked for a document evidencing release of security interest on the assets of the Corporate Debtor, from the members constituting the erstwhile CoC of the Corporate Debtor before disbursing payments in accordance with the approved Resolution Plan. On the contrary, the approved Resolution Plan contained no such clause.
- 3.3. On the failure of the SRA to pay the outstanding dues within the stipulated timeline, a further meeting of the Monitoring Committee was held on 24 December 2019, *i.e.*, 3rd Meeting, where the SRA cited the following reasons for non-payment in terms of the Approved Resolution Plan:
- (i) No material response from the Secured Financial Creditor on the communication being sent by the SRA regarding in-principle NoC for release of securities.
 - (ii) A few of the Financial Creditors have challenged the order of this Adjudicating Authority approving the Resolution Plan.
- 3.4. The approval of the Resolution Plan by this Adjudicating Authority was challenged before the Hon'ble NCLAT by two of the Financial Creditors, *i.e.*, LIC Housing Finance Limited (LICHFL) and Union Bank of India. The Company Appeal¹⁰ filed by LICHFL is still pending before the Hon'ble NCLAT. However, the Hon'ble NCLAT, *vide* its order dated 17 February 2020,¹¹ categorically ordered that the Resolution Plan be implemented, subject to a sum of ₹10,03,33,879.34 being kept in an interest-bearing account till the disposal of the Appeal. Further, the Hon'ble NCLAT again in its order dated 16

⁹ Pages 67-68 of IA (IB) No.1275/KB/2020 (Para 14.2 of the Resolution Plan)

¹⁰ Company Appeal (AT) (Ins) No.1328 of 2019

¹¹ Pages 145 of IA (IB) No.1275/KB/2020, @ page 146, para 4 of the order

March 2020¹² noticed the failure of the SRA to come forward with upfront money. It gave liberty to the CoC to move an application for default before the Adjudicating Authority under section 33(3) of the Code. Further, the Company Appeal¹³ filed by Union Bank of India was disposed of by the Hon'ble NCLAT *vide* order dated 04 December 2019,¹⁴ observing it to be frivolous.¹⁵

- 3.5. In the year 2020, NTCIL Real Estate Private Limited also appealed against the approval order of the Adjudicating Authority.¹⁶ The Hon'ble NCLAT in its order dated 05 March 2020 has observed that the said appeal is beyond the prescribed period of limitation, but the Company Appeal is still pending.
- 3.6. Even after a discreet direction to the SRA by the Hon'ble NCLAT, the SRA, in the 4th Monitoring Committee Meeting held on 06 February 2020,¹⁷ cited the ground of pendency of the appeal by LICHFL as a reason for non-payment in terms of the approved Resolution Plan. The SRA also requested for NoC with respect to release of Security Interest of the assets of the Corporate Debtor.
- 3.7. At the 5th Monitoring Committee Meeting held on 16th March 2020,¹⁸ the SRA mentioned that transfer of the amount was taking time due to legal compliances and completion of formalities, and that Mr Amardeep Sharma, the authorised representative of the SRA, was himself affected by Covid and was under mandatory quarantine for 14 days which would get over by 24th March 2020. Mr Sharma himself explained that the transfer was expected to be completed by 27th March 2020.¹⁹

¹² Page 148 of IA (IB) No.1275/KB/2020

¹³ Company Appeal (AT) (Ins) No.1387 of 2019

¹⁴ Pages 150-153 of IA (IB) No.1275/KB/2020

¹⁵ Page 153 of IA (IB) No.1275/KB/2020

¹⁶ Company Appeal (AT) (Ins) No.363 of 2020

¹⁷ Minutes at pages 154-156 of IA (IB) No.1275/KB/2020

¹⁸ Minutes at pages 157-159 of IA (IB) No.1275/KB/2020

¹⁹ Last para at page 158 of IA (IB) No.1275/KB/2020

- 3.8. At the 6th Meeting of the Monitoring Committee held on 18 March 2020,²⁰ the SRA sought time on account of Covid-19 and promised to transfer funds in accordance with the approved Resolution Plan.
- 3.9. Thus, in every meeting the SRA kept on seeking for extension of time on different grounds.²¹
- 3.10. Further, the PBGs given by the SRA are in contradiction to clause 1.8.1 of the Request for Resolution Plans (**'RFRP'**), where it has been specifically mentioned that the bank guarantees should be executed from a scheduled bank located in India. The observations dated 07 April 2020²² of one of the Financial Creditors, Syndicate Bank, on the PBGs issued by the SRA were as follows:
- (i) The credentials of Axios Credit Bank, Gambia, are not verified;
 - (ii) The SWIFT code of Axios Credit Bank (AXCDGMG1) ends with 1 (eighth character is 1- the SWIFT Code cannot be used for direct communication with the bank).
 - (iii) The Applicant of the BG is Konig General Trading FZE, UAE, on behalf of Almas Global Opportunity Fund. The relationship/consideration between the two is not known.
 - (iv) Invocation of the BG is to be done by presentation of copy of BG at the counters of the Axios Credit Bank, Singapore within last 15 days of expiry. Invocation through SWIFT is not possible.
 - (v) Invocation of BG is to be accompanied with a BG amendment to be issued at the request of the applicant. Therefore, the beneficiary is dependent on the applicant for invocation.
 - (vi) BG amendment is to be sent by Axios Credit Bank (SWIFT Code: AXCDGMG1) to the beneficiary at the request of applicant. Axios Credit Bank cannot send SWIFT message [*ref*: point (ii) above].
 - (vii) A discrepant claim for payment will lead to immediate termination of the BG. It is evident that the payment of the BG is solely dependent on the

²⁰ Pages 160-163 of IA (IB) No.1275/KB/2020

²¹ Pages 164-210 of IA (IB) No.1275/KB/2020

²² Page 121 of IA (IB) No.1275/KB/2020

applicant. The BG should be unconditional as far as payment is considered.

Hence, the PBGs were conditional in nature and contrary to the RFRP and Letter of Intent (*'LoI'*) dated 03 October 2019 issued by the Chairman, *i.e.*, erstwhile RP.

- 3.11. From the date of approval of the Resolution Plan by this Adjudicating Authority no appropriate steps has been taken by the SRA. One of the key features of the Resolution Plan was that the SRA would discharge all the obligations of the Corporate Debtor in respect of the Bank Guarantees issued on behalf of the Corporate Debtor, *i.e.*, for a sum of ₹668,29,17,366/- (Rupees six hundred and sixty-eight crore twenty-nine lakh seventeen thousand three hundred sixty-six only), because such invocation would result in good value to the secured creditors.
- 3.12. So far, the Chairman has successfully managed to ensure that the Bank Guarantees to the tune of ₹458,09,65,460/- (Rupees four hundred fifty-eight crore nine lakh sixty-five thousand four hundred sixty only) issued on behalf of the Corporate Debtor remain uninvoked. Further, the fact that the Corporate Debtor has been kept as a going concern till now reflects the revival potential of the Corporate Debtor.
- 3.13. Liquidation of the Corporate Debtor will not only jeopardise the employment of 400 employees associated with the Corporate Debtor but also will not fetch a sum of ₹568 crore being the payment required to be made by the SRA. Further, from time to time, several potential applicants have expressed their interest in the Corporate Debtor.
- 3.14. Mr. Joy Saha, Ld. Sr. Advocate appearing on behalf of the Applicant, has relied on the judgment of the Hon'ble Supreme Court in *Arun Kumar Jagatramka v Jindal Steel and Power Limited and another*,²³ (*Para 41*) and also on NCLT,

²³ (2021) 7 SCC 474 : 2021 SCC OnLine SC 220 decided on 15 March 2021

Chennai Bench order in the matter of ***Orchid Pharmaceuticals Limited***,²⁴ where the NCLT annulled the approved Resolution Plan and provided a fresh lease of life to the Corporate Debtor to again undergo CIRP from the stage of invitations of EoIs, so that there could be every possibility of bailing out the Corporate Debtor from death.

4. Submissions of Mr Ratnanko Banerji, Ld. Sr Counsel appearing on behalf of the SRA/Respondent

- 4.1. The implementation of the Resolution Plan is on-going, and the Corporate Debtor has been running successfully as a going concern. The SRA is providing co-operation for the same.
- 4.2. The Applicant, *i.e.*, the Chairman of the Monitoring Committee has no *locus standi* to make this Application and claim for reliefs in terms of sections 33(3) and 33(4) of the Code. This Application is also barred by estoppel, and hence is liable to be dismissed.
- 4.3. It is apparent that 330 days of CIRP was exhausted by the time the Resolution Plan was approved by this Adjudicating Authority. Therefore, there is no room to resume the CIRP when the timeline has been exhausted. Besides, there is no provision in the Code for restarting the CIRP once the Resolution Plan is cancelled. Liquidation would be the only option.
- 4.4. Since the Corporate Debtor is a going concern, the order of liquidation would be detrimental to all the stakeholders, including the Corporate Debtor and to the SRA as well.
- 4.5. It was settled under the Resolution Plan that the SRA will not only pay an upfront amount of ₹568 crore, but will also assume contingent liability of outstanding BGs of the Corporate Debtor in a sum of ₹762.92 crore. Such liability is to be met by issue of Non-Convertible Debentures (NCDs) in case they are invoked.

²⁴ MA/575 & 576/2018 and MA/146/2019 in CP/540/IB/CB/2017 decided on 28 February 2019

- 4.6. From time to time, the SRA kept the Financial Creditors updated of the circumstances, which were beyond the control of the SRA and because of which the Resolution Plan could not be implemented.
- 4.7. The reasons for delay and the events that have transpired are as follows:
- (i) Several litigations during the implementation of the Resolution Plan.
 - (ii) Because of several appeals filed before the Hon'ble NCLAT, the SRA asked for 'in-principle No Objection Certificate' from each of the Secured Financial Creditors prior to the payment of the upfront amount. The NoC was to confirm the willingness and readiness of the Secured Creditors to release all charges over the assets of the Corporate Debtor. Despite agreeing to this, not all Financial Creditors provided the NoC, which led to serious uncertainty regarding release of security.
 - (iii) The worldwide Covid-19 pandemic disrupted the normal business operation all over the world. As the funds would have been transferred from the United Kingdom (UK), there were several bottlenecks and difficulties being faced by the SRA, causing the delay.
- 4.8. Nevertheless, the SRA is genuinely interested and has earnestly endeavoured to fulfil the commitments under the approved Resolution Plan. It is only by reason of unprecedented situations that the Resolution Plan could not be implemented.
- 4.9. The Resolution Plan also provides for a *force majeure* clause, as follows:
- “29.1 Notwithstanding anything to the contrary contained in this Resolution Plan or any other documents including any definitive documents, the Resolution Respondent agrees and confirms that there are no conditions, assumptions and or qualifications for effectiveness of the Resolution Plan, whether before approval by the Adjudicating Authority or thereafter until the Effective Date and thereof other than the following conditions:*
-
- However, if there is a change in the circumstances in which the Resolution Plan was proposed including Force Majeure, then the Resolution Respondent will be entitled to withdraw the Resolution Plan without being imposed or suffering any penalty.”*

- 4.10. The transfer of the upfront amount would have been executed soon by the SRA after receiving the ‘*in-principle No Objection Certificate*,’ had it not been for the worldwide quarantine measures and travel restrictions in the wake of the Covid-19 pandemic.
- 4.11. If the extension of the payment of the upfront amount is not allowed, the stakeholders and the Corporate Debtor will not only suffer a loss of ₹568 crore, but also additional loss of ₹587.11 crore due to invocation of the existing Bank Guarantees of the Corporate Debtor.

5. *Issues involved*

- 5.1. On this conspectus of facts, the following issues emerge for determination:
- (a) Can the Adjudicating Authority entertain an application filed by the Chairman of the Monitoring Committee to give a fresh lease of life to the CIRP; and
- (b) Can the Adjudicating Authority pass the directions sought for in IA (IB) No.1275/KB/2020, if the SRA fails to implement the Plan?

6. *Analysis*

- 6.1. We’ve heard the Ld. Sr. Counsel appearing on behalf of the parties and perused the record.

Issue No.1: On locus of the Chairman of the Monitoring Committee to maintain IA (IB) No.1275/KB/2020 for abrogation of the approved Resolution Plan

- 6.2. The primary issue that needs to be delved into is whether the Applicant, *i.e.*, the Chairman of the Monitoring Committee, has any *locus standi* to file the IA.
- 6.3. The legislative framework in which this question must be decided, is given in section 33(3)²⁵ of the Code. This provision speaks of contravention of the

²⁵ **33. Initiation of liquidation.**– (1) & (2) * * *

(3) Where the resolution plan approved by the Adjudicating Authority under section 31 or under sub-section (1) of section 54L, is contravened by the concerned corporate debtor, any person other than the corporate debtor, whose interests are prejudicially affected by such contravention, may make an application to the Adjudicating Authority for a liquidation order as referred to in sub-clauses (i), (ii) and (iii) of clause (b) of sub-section (1).

approved Resolution Plan. It stipulates that in the event of contravention of such approved Resolution Plan, any person other than the Corporate Debtor, whose interests are prejudicially affected by such contravention, may make an application to the Adjudicating Authority for a liquidation order. The use of the phrase, 'any person other than the Corporate Debtor' clearly indicates the will of the legislature that except the Corporate Debtor itself, any person whose interests are being prejudicially affected from the breach of the Resolution Plan could file the application for liquidation.

- 6.4. When a Resolution Plan is approved, the CoC stands dissolved and a new committee, *i.e.*, the Monitoring Committee is formed for implementation of the approved Resolution Plan. In a scenario where the SRA has failed to implement the Resolution Plan within a stipulated time, it is the Monitoring Committee's duty to ensure that the interests of the stakeholders are safeguarded. In fact, the Chairman of the Monitoring Committee is in the best possible position to determine whether there has been a contravention of the approved Resolution Plan. Therefore, the Chairman of the Monitoring Committee has locus to maintain the present application, with or without a resolution to this effect being passed by the Monitoring Committee.
- 6.5. In this view of the matter, the arguments of the SRA in this regard that the Chairman could not maintain the present application for liquidation in the absence of any resolution passed by the Monitoring Committee, is not sustainable, and is rejected as a non-starter.

Issue No.2: Whether the prayers sought for in IA (IB) No.1275/KB/2020 for abrogation of the approved Resolution Plan should be granted

- 6.6. The last date for payments to be made under the approved Resolution Plan was sixty days²⁶ from the date of approval of the Resolution Plan. The CoC approved the Resolution Plan on 02 October 2019. The Adjudicating Authority approved the Resolution Plan on 21 October 2019.²⁷ Therefore, the last date

²⁶ Page 67 of IA (IB) No.1275/KB/2020, Table at para 14.2

²⁷ Pages 126-139 of IA (IB) No.1275/KB/2020, Operative Portion at page 138

for making full payment of ₹568 crore in terms of the Resolution Plan was 20 December 2019 (*and not 21 December 2019 as stated in the application*).

- 6.7. As against this, the SRA made a total payment of ₹30 crore on 08 January 2021 towards Earnest Money Deposit and Performance Bank Guarantee. Even this was after the present application in IA (IB) No.1275/KB/2020 was filed by the Chairman of the Monitoring Committee. Of this, except for the EMD, no payment has actually come from the SRA. The remaining part was due to invocation of the PBGs, and not any positive act of 'payment' on the part of the SRA.
- 6.8. One of the excuses taken by the SRA for non-implementation is the Covid-19 pandemic. However, this is noticed only to be rejected, since the *entire* payment was to be made at least three months before the pandemic hit globally. Para 5.3²⁸ of the Resolution Plan gives the financial highlights of the SRA. It is stated to have Assets Under Management to the tune of ₹115,14,15,064/- (Rupees one hundred and fifteen crore fourteen lakh fifteen thousand and sixty-four only), during the period from 16 April 2018 to 15 April 2019. The said paragraph also records that the SRA and its holding company, Almas Capital Limited, have not availed any loans from any bank.
- 6.9. Para 11²⁹ of the Resolution Plan indicates sources of funds and manner of infusion into the corporate debtor. It records that the SRA holds sound financial position and shall infuse the resolution amount in the form of equity. It further records that financial institutions and banks are also willing to extend financial assistance to the resolution applicant for raising funds. Para 12.1³⁰ categorically provides that the implementation of the Resolution Plan will begin once the Resolution Plan is approved by the CoC and the Adjudicating Authority. Para

²⁸ Page 43 of IA (IB) No.1275/KB/2020, internal page 20 of the Resolution Plan

²⁹ Pages 61-62 of IA (IB) No.1275/KB/2020, internal pages 38-39 of the Resolution Plan

³⁰ Page 63 of IA (IB) No.1275/KB/2020, internal page 40 of the Resolution Plan

IN THE NATIONAL COMPANY LAW TRIBUNAL
KOLKATA BENCH-I

*IA (IB) No.1275/KB/2020 in in CP (IB) No.1237/KB/2018
In the matter of EMC Limited*

14³¹ reflects the Term of the Resolution Plan and Implementation Process thereof.

6.10. The Legal Entity Identifier (*'LEI'*) in respect of the SRA indicates the basic information as follows:³²

Legal Name:	ALMAS GLOBAL OPPORTUNITY FUND SPC	
Changes brought about:	New Value	Old Value
Registered At:	RA000087	RA000086
Registered As:	1882414	AC-322800
LEI Code:	549300P6S7KWNOMKMU42	
Entity Status:	Active	Lapsed on 28 Feb 2020
Legal Address:	Amicorp Cayman Fiduciary Ltd, 2 nd Floor, Regatta Office Park, Leeward 2 West Bay Road Grand Cayman, KY1-1006, KY	Amicorp Cayman Fiduciary Ltd, 1 st Floor, The Grand Pavilion Commercial Centre, Grand Cayman, KYI-10
Headquarters Address:	Amicorp Cayman Fiduciary Ltd, 2 nd Floor, Regatta Office Park, Leeward 2 West Bay Road Grand Cayman, KY1-1006, KY	Amicorp Cayman Fiduciary Ltd, 1 st Floor, The Grand Pavilion Commercial Centre, Grand Cayman, KYI-10
Registration Date:	2019-03-06; 21:03.00 (+5.30)	
Last Update Date:	2021-12-31; 03:00:00 (+5.30)	
Registration Status:	Issued	
Next Renewal Date:	2022-12-29; 18:29:00 (+5.30)	
LEI Issuer:	EVK05KS7XY1DEI13R011	

6.11. The change in registration information, as well as in its headquarters address, does not appear to have been communicated to the Monitoring Committee.

³¹ Page 67 of IA (IB) No.1275/KB/2020, internal pages 44-45 of the Resolution Plan (Sl Nos.12 to 16 of the table in para 14.2 at pages 44-45)

³² https://search.gleif.org/#/record/549300P6S7KWNOMKMU42/record_modifications, last accessed 15 April 2022 at 3.16 PM

- 6.12. The payment of a sum of ₹30 crore on 08 Jan 2021 was **after** the filing of the present application by the Chairman of the Monitoring Committee. In fact, not a single paisa has been brought in by the SRA after 08 January 2021. Multiple opportunities were granted to the SRA to file affidavits to affirm as to how it proposes to bring in funds. This was in addition to the Monitoring Committee's own long rope to the SRA to fulfil its commitments as per the Plan.
- 6.13. The averments in the reply of the SRA and the affirmations in the additional affidavits which were allowed to be filed in this regard, tell a story of their own, a litany of broken promises and commitments. These are extracted below:

Reply affidavit:

"In view of the above facts and circumstances, it is submitted that it is just, proper and necessary that the respondent be granted an opportunity to fulfil its obligations in a time bound manner by June 30, 2021. With the approval and release of Covid-19 vaccine globally and the same being gradually made available across the world the respondent is confident that it shall be able to honour its commitments by June 30, 2021."³³

(b) condonation of the delay caused in transferring the Upfront Amount till date;³⁴

(e) the respondent be allowed time till June 30, 2021 to transfer the balance of ₹538 crore of the Upfront Amount, to the bank account of the erstwhile Corporate Debtor as per the Resolution Plan.

Unnotarised affidavit of Mr Amardeep Sharma dated 12 March 2021:

"10. I have explored ways and means to make some payments in pursuance to the approved Resolution Plan prior to 30th June, 2021. However, in view of what has been stated hereinbefore, I most humbly submit that it will not be possible to make any such payments. However, I undertake that the entire payment will be made on or before 30th June, 2021."

Further affidavit of Mr Amardeep Sharma affirmed in Dubai:

(9) However, the Successful Resolution Applicant is taking all positive steps to arrange for necessary documentation and arranging its affairs so that the final

³³ Para 26, page 29 of the SRA's reply in IA (IB) No.1275/KB/2020

³⁴ Para 27, page 30 of the SRA's reply in IA (IB) No.1275/KB/2020

commitment to make the payment of the balance upfront amount by October 31st, 2021, as an outer limit can be fulfilled. The successful resolution applicant remains wholly committed to make the balance payment as prayed for in this affidavit.”

- 6.14. It has been noticed in the order dated 27 January 2022 passed by this Adjudicating Authority that the affidavits do not inspire any confidence. Besides, there is no explanation proffered by the SRA as to why the commitments made to this Adjudicating Authority could not be met. Therefore, another opportunity was given to file an affidavit on or before 15 February 2022 giving a detailed roadmap of how the SRA intends to discharge its commitments under the approved Resolution Plan.
- 6.15. That affidavit was even more impudent. It seems to assume that the judicial authorities in India cannot understand anything beyond the limited territorial jurisdiction of India. It cocked a snook even at the very Code itself, the processes envisaged thereunder and the authority of court. It is so brazen that it is almost laughable, if not for the solemnity of these proceedings.

Confidential information and law relating to its disclosure in the Cayman Islands

- 6.16. Another alibi taken by the SRA is the Confidentiality law of the Cayman Islands, under which it is asserted that the SRA cannot reveal commercial information ostensibly related to funding of the Resolution Plan. In this context it is to be noted that the Confidentiality Relationships (Preservation) Law, 1976 (CRPL)³⁵ enacted in 1976 was repealed,³⁶ and the Confidential Information Disclosure Law (CIDL), 2016 enacted in the Legislature of the Cayman Islands on 22 July 2016 (Law 23 of 2016).³⁷

³⁵ <https://www.hsa.ky/wp-content/uploads/2018/07/Confidential-Relationships-Preservation-Law.pdf>, last accessed 15 April 2022, 7.01 PM

³⁶ Repeal is as per section 6 of CIDL 2016

³⁷ https://legislation.gov.ky/cms/images/LEGISLATION/PRINCIPAL/2016/2016-0023/ConfidentialInformationDisclosureAct_Act%2023%20of%202016.pdf, last accessed 15 April 2022, 7.02 PM

- 6.17. Section 3(1)(a) of CIDL recognises that where a person owes a duty of confidence, the disclosure by that person of confidential information in compliance with the directions of a court pursuant to section 4 *ibid* shall not constitute a breach of such duty of confidence and shall not be actionable at the suit of any such person. Section 4 of CIDL provides the mechanism by which such confidential information may be disclosed if required to do so by any court, **tribunal** or other authority, in a situation where the person has not been provided with the express consent of the principal for disclosure. The person who intends to or is required to disclose such information either in evidence or in proceedings, whether in the Cayman Islands or elsewhere, was required to make an application to the Grand Court, which is in session throughout the year.³⁸
- 6.18. It is apparent that the SRA has intentionally delayed the whole process and failed to make the upfront payment within sixty days from the days of approval of the Resolution Plan by the Adjudicating Authority, *i.e.*, 21 October 2019 (***Effective Date***). Worse, the SRA kept on delaying the payment on frivolous grounds even after explicit directions from the Hon'ble NCLAT *vide* its order dated 16 March 2020.
- 6.19. The two main planks of the defence of the SRA to non-payment under the approved resolution plan are – (1) Covid-19 pandemic and the restrictions; (2) the non-issue of in principle NoC on the part of the secured Financial Creditors. Both defences are hollow, as we shall presently see from the documents produced by the SRA.
- 6.20. The SRA has so offhandedly stated Covid-19 as one of the reasons for delay in the implementation of the Resolution Plan, but the same does not hold water at all, because the upfront payment was to be made within sixty days from the Effective Date of the Plan, *i.e.*, 21 October 2019, while the pandemic hit India in March 2020. The SRA's authorised representative was based in Dubai.

³⁸ <https://www.judicial.ky/courts/grand-court>, last accessed on 15 April 2022 at 7.14 PM

Dubai imposed a two-week lockdown for the first time on 05 April 2020 (Saturday),³⁹ which was three months later than the date of payment of the upfront amount (20 December 2019). As such the SRA was not constrained by the pandemic.

6.21. The other prime argument that the security interest holders delayed issue of NoCs is also absolutely unacceptable, considering the following clauses:

Relevant clause of the Resolution Plan	Commitment under the clause
Clause (f) at internal page 29 of the Resolution Plan ⁴⁰	<u>Upon upfront payment of Financial Creditors</u> , the Financial Creditors shall severally and/or jointly release the Security Interest in favour of Corporate Debtor, specific to the assets of the Corporate Debtor, as per Schedule 2. Financial Creditors shall continue their charge and rights on securities owned by third parties, personal and corporate guarantees.
Clause (f)(iv) at page 30 of the Resolution Plan ⁴¹	All security interest, specific to the assets owned by Corporate Debtor, created in favour of the financial creditors will stand released back to Corporate Debtor with the approval of the resolution plan by the Adjudicating Authority <u>and receipt of the upfront consideration</u> . The Financial Creditors shall execute and/or cause to execute agreement/deed/document as may be required in respect thereof and to provide clear title for securities to Corporate Debtor/ Resolution Applicant.
Clause (f)(v) at page 30 of the Resolution Plan ⁴²	The security interest holders shall forthwith <u>on receiving upfront consideration</u> in terms of the Resolution Plan issue No Due Certificates and file

³⁹ India Today news report of 05 April 2020, attached at page 166 of the SRA's reply to IA (IB) No.1275/KB/2020

⁴⁰ Page 52 of IA (IB) No.1275/KB/2020

⁴¹ Pages 52-53 of IA (IB) No.1275/KB/2020

⁴² Page 53 of IA (IB) No.1275/KB/2020

Relevant clause of the Resolution Plan	Commitment under the clause
	duly filled Charge Satisfaction Forms with the Ministry of Corporate Affairs (MCA) for release of charge on the assets of the Corporate Debtor. The Corporate Debtor will also file duly filled charge satisfaction Forms with the MCA for release of charge on its assets.
Clause (f)(v) at page 30 of the Resolution Plan ⁴³	The Security interest holders shall file necessary release of security interest documents with any information utility with which any of its security interest is noted <u>forthwith on receiving their upfront consideration</u> under this Resolution Plan including security interest noted with CERSAI.

As can be seen from the above table, drawn from the Resolution plan itself, making upfront payment by the SRA was a pre-requisite for release of the security interest and not vice-versa.

- 6.22. All the three bank accounts of the SRA, as given in para 5.3⁴⁴ of the Resolution Plan, are in Mauritius. However, in the affidavits filed in compliance with directions issued by the Adjudicating Authority, the stand taken has been that due to lockdown in the United Kingdom, the SRA's authorised representative has been unable to travel to that country, and therefore, could not adhere to the time schedule committed by him. This still does not explain why the SRA did not make the payment on or before 20 December 2019 as per the approved Resolution Plan.
- 6.23. There was really no need for the SRA once again to insist that NoCs in principle be issued by the secured creditors **prior** to making upfront payment. This was a pre-condition that was sought to be introduced by the SRA just to cover up its own failure to move the funds to the Corporate Debtor as envisaged under the

⁴³ Page 53 of IA (IB) No.1275/KB/2020

⁴⁴ Page 43 of IA (IB) No.1275/KB/2020, internal page 20 of the Resolution Plan

Resolution Plan. The SRA's justification to this is that appeals came to be filed before the Hon'ble NCLAT. This reflects an absolutely lack of confidence in the sanctity of the judicial process of this country.

- 6.24. From the conduct of the SRA, it is apparent that the SRA has not only frustrated the whole object of the Code but also disrespected the orders of the Appellate Authority and this Adjudicating Authority. The affidavit filed by the SRA pursuant to the order dated 27 January 2022 of this Adjudicating Authority, which directed the SRA to show how it intends to discharge its obligations, is neither here nor there.
- 6.25. The entire process begs the question as to how the CoC assessed the viability and feasibility of the Resolution Plan submitted by the SRA. It also raises a question as to how the CoC approved the Resolution Plan without insisting on an unconditional PBG, which is envisaged in terms of regulation 36B(4A)⁴⁵ of the CIRP Regulations, immediately after the CoC approved the Plan. This sub-regulation (4A) was inserted into regulation 36B of the CIRP Regulations *vide* amendment No.IBBI/2019-20/GN/REG040 dated 24 January 2019. The RP presented the Resolution Plan for the Adjudicating Authority's approval without taking an unconditional PBG. This is a violation of the law. It is just a happy coincidence that the PBG came in after the present IA (IB) No.1275/KB/2020 was filed by the Chairman of the Monitoring Committee and before the first hearing of the matter took place on 04 January 2021.

⁴⁵ (4A) The request for resolution plans shall require the resolution applicant, in case its resolution plan is approved under sub-section (4) of section 30, to provide a performance security within the time specified therein and such performance security shall stand forfeited if the resolution applicant of such plan, after its approval by the Adjudicating Authority, fails to implement or contributes to the failure of implementation of that plan in accordance with the terms of the plan and its implementation schedule.

Explanation I. – For the purposes of this sub-regulation, “performance security” shall mean security of such nature, value, duration and source, as may be specified in the request for resolution plans with the approval of the committee, having regard to the nature of resolution plan and business of the corporate debtor.

Explanation II. – A performance security may be specified in absolute terms such as guarantee from a bank for Rs. X for Y years or in relation to one or more variables such as the term of the resolution plan, amount payable to creditors under the resolution plan, etc.

7. The findings

- 7.1. Mr Amardeep Sharma, the authorised representative of the SRA, tried to mislead the court by stating that the SRA would have met its obligations but for the travel restrictions imposed in the wake of the Covid-19 pandemic. However, that does not commend itself to us, considering that the SRA was not about to give ₹568 crore in hard currency, but was only required to transfer the same from its bank accounts. The time for such transfer was about four months *prior* to the pandemic. In any case, physical travel was not called for at all for transfer of funds, which could have been done by banking channels. There is no justification for this, even after repeated opportunities were granted first by the Monitoring Committee and thereafter by this Adjudicating Authority.
- 7.2. The SRA has not exhibited any intention by taking some concrete steps that can instil some degree of confidence in the earnestness of the SRA. It is plain for anyone willing to see that the SRA is not likely to part with the funds in the foreseeable future. The SRA has taken the entire process for a ride, and nothing can really excuse this audacity. The attitude of the SRA really will tick every parameter that can be applied to satisfy the “*knowing and wilful contravention*” test laid down in section 74(3)⁴⁶ of the Code on a reasonable construction.
- 7.3. The SRA has been pussyfooting around with regard to the payments to be made under the approved Resolution Plan, for more than one-and-a-quarter years. It is futile to wait indefinitely for the SRA to fulfil its commitments. The repeated exhortations made during the course of hearings to the SRA through its learned senior counsel to make at least some payments in order to show its *bona fides*,

⁴⁶ **74. Punishment for contravention of moratorium or the resolution plan.**— (1) & (2) * * *

(3) Where the corporate debtor, any of its officers or creditors or any person on whom the approved resolution plan is binding under section 31, knowingly and wilfully contravenes any of the terms of such resolution plan or abets such contravention, such corporate debtor, officer, creditor or person shall be punishable with imprisonment of not less than one year, but may extend to five years, or with fine which shall not be less than one lakh rupees, but may extend to one crore rupees, or with both.

& earnestness have gone completely unheeded. There is no point in chasing the chimera of the SRA fulfilling its commitments under the Resolution Plan.

- 7.4. We will now have to accept the hard reality that stares us in the face: that the SRA has simply hedged its bets by not meeting its obligations, probably because it is earning better returns on income from its existing investments.
- 7.5. What has really spared the blushes in the present case is the efficiency with which the Chairman of the Monitoring Committee has been running the Corporate Debtor. But this cannot go on for ever. A strong message needs to go to the SRA that the majesty of law needs to be respected at all costs, and that Indian judicial processes cannot be taken for a ride like this. The SRA seems to think that other suitors will not come in to hold the hand of the Corporate Debtor and pull it out of insolvency. Therefore, we fully intend to call the bluff of the SRA that non-extension of time will put the Corporate Debtor and its stakeholders in serious jeopardy.
- 7.6. Since the Corporate Debtor has been kept as a going concern by the Chairman of the Monitoring Committee, every effort should be made to give one more chance at resolution before we order liquidation as a last resort.

8. Orders

- 8.1. In these circumstances, the following orders are passed:
- (i) The entire Performance Bank Guarantee of ₹30 crore submitted by the SRA on 08 January 2021, which was invoked by the Applicant/Chairman of the Monitoring Committee, on 13 November 2020 shall stand forfeited in favour of the Corporate Debtor immediately, since there is knowing and wilful contravention of the approved Resolution Plan.
 - (ii) Additionally, the SRA and its officers responsible be proceeded against for contravention of the approved resolution plan in terms of section 74(3) read with section 236⁴⁷ of the Insolvency & Bankruptcy Code, 2016. To

⁴⁷ **236: Trial of offences by Special Court.—**

(1) Notwithstanding anything in the Code of Criminal Procedure, 1973, offences under this Code shall be tried by the Special Court established under Chapter XXVIII of the Companies Act, 2013.

facilitate this, a copy of this order shall be sent to the Insolvency & Bankruptcy Board of India (IBBI) and the Secretary, Ministry of Corporate Affairs, who are the agencies authorised in terms of section 236(2) *ibid* to initiate appropriate complaint before the Special Court as envisaged under section 236(1) *ibid*.

- (iii) The Corporate Debtor is a viable going concern with about 400 employees and workmen. There is every chance of a successful resolution of the Corporate Debtor. Therefore, to facilitate this, the entire period consumed in the CIRP commencing from the first date of issue of Form G inviting Expressions of Interest till the date of passing of orders in this application is excluded. This will grant sufficient time for a limited reboot of the CIRP from the stage of issue of Form G.
- (iv) The Chairman of the Monitoring Committee shall discharge the functions of Resolution Professional of the Corporate Debtor with immediate effect and until further orders are passed by this Adjudicating Authority.

- 8.2. IA (IB) No.1275/KB/2020 shall stand disposed of with the above directions. Consequently, CP (IB) No.1237/KB/2018 shall stand restored to file, and the CP shall stand posted to 22 August 2022 for reporting progress.
- 8.3. Copies of this order be circulated immediately to the Ld Counsel on record for each of the parties.
- 8.4. A certified copy of this order may be issued, if applied for, upon compliance with all requisite formalities.

Balraj Joshi
Member (Technical)

Rajasekhar V.K.
Member (Judicial)

The Order is pronounced on 20 April 2022

Safura A., LRA

(2) No Court shall take cognisance of any offence punishable under this Act, save on a complaint made by the Board or the Central Government or any person authorised by the Central Government in this behalf.